

International Law in Asia

Shen Wei *Editor*

# International Investment Law at the Juncture

An Asian Perspective

 Springer

# **International Law in Asia**

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Editor

# International Investment Law at the Juncture

An Asian Perspective

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# Preface

International investment law is at a juncture. Foreign direct investment (FDI) still has not recovered from the global financial crisis but has been badly hit by the COVID-19 pandemic. The rise of developing and transitional economies in outbound FDI is reshaping the FDI landscape leading to more restrictive and conservative regulatory measures toward FDI evidenced by the national security review mechanisms which now have been adopted by most developed countries. The wide spread of the national security review mechanisms toward outbound FDI worsens the neo-liberalism-based international investment law. This book captures this historical moment in the investment arena with a focus on Asia.

Given a more conservative FDI regulatory move and a more intensive geopolitical struggle, it is not a surprise to see a return of the state (which actually started right after the global financial crisis) or a revival of the Calvo Doctrine at least in more South states. It is not merely about more emphasis on police power or the host state's right to regulate in the BIT terms. Rather, not only some developing countries but also more developed countries are now skeptical of international investment law, bilateral investment treaties (BITs) and investor-state dispute settlement (ISDS) system as a whole. As a result, more countries are now abandoning ISDS in free trade agreements (FTAs) or denouncing BITs completely.

Jiang and Li's article first outlines several mainstream lines of arguments analyzing international investment law. Western countries often justify foreign investors' right to arbitrate and right for protection by arguing that BIT terms play as constitutional terms binding host state governments. When Western countries are not shifting their role in the investment arena becoming the major recipient of FDI and more often brought by foreign investors into the investment arbitration cases, they are now arguing for more rights to regulate and claiming that a more balanced approach is desirable. While Shan's article argues that the Calvo Doctrine is not dead, Shen and Feng's article discusses the return of the Calvo Doctrine and explains the background of this return. These three articles rightly draw a picture to the readers and tell the readers the past, the present and the future of international investment law.

Despite the restrictive regulatory move, international investment law, like the WTO law, is now more concerned about human rights including but not limited to environmental protection, labor rights, climate change and corporate social responsibility. Some BITs and FTAs even cover anti-corruption. Qi and Liu's article discusses how carbon neutrality becomes a topic or even a term in BITs.

The next five articles focus on the ISDS's legitimacy crisis and possible reforms. Various reform plans have been proposed and their pros and cons are discussed in some details in these articles. There is no quick action plan in the near future, but some ideas have been put in ink in some new BITs or FTAs. EU is taking a driver's seat, while Asia countries are hesitant waiting for others to move forward first. Li and Shen's article looks at the ISDS reform from a political economy lens. Labin and Soloveva allow us to understand Russia's stance in the ISDS reform. Lee offers a unique picture of Korea's ISDS proceedings in its treaty with the US. Zhao switches from arbitration to mediation which is said to be a valid alternative for future ISDS reform. Zhang's article gives us a sense of China's role in its BIT-making and ISDS reform.

In the last article, Leong gives us a quick update on Macao and its ambition to draw more FDI in its financial sector. Macao is always viewed Asia's Las Vegas and its potential and ambition is worth discussing in a larger picture.

This book has an ambitious agenda to offer more Asian perspectives. This may be a challenging target to meet given the wide span of countries in Asia. It would be interesting to include articles on Japan, ASEAN countries, and central Asian states, among others. This may be the topic of the next book.

Last but not the least, I want to thank all authors for their grateful contribution to this book and the respective publishers' consents (where relevant). I also want to acknowledge and is grateful for the support of the Singapore International Dispute Resolution Academy's BRI program. Professor Eric Lee initiated this project and offered his help throughout the whole publication process. Springer's editing and publishing team is also helpful in making this book happen. I look forward to the readers' comments and criticisms which would make us give more thoughts to the future of international investment law or even globalization as a whole.

Shanghai, China  
The New Year Evening 2024

Shen Wei

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# Chapter 1

## Pluralism, Cosmopolitanism, or International Economic Law Constitutionalism



Tao Li and Zuoli Jiang

### Introduction

When discussing scholarship in the area of international economic law ('IEL'), there is a man whose work cannot be ignored. He is Ernst-Ulrich Petersmann, an Emeritus Professor at the European University Institute. Professor Petersmann is well-known for his decades of efforts in developing a monolithic theoretical base for IEL. His writings cover various issues, including the reform of the UN,<sup>1</sup> the future of the world trading system,<sup>2</sup> and the de-fragmentation of international law regimes.<sup>3</sup> However, the instruments he has employed for analyzing those issues are basically unchanged, namely Western constitutionalism theory in conjunction with human rights law. He has thereby developed an IEL constitutionalization theory,<sup>4</sup> which, in his own words, has long been neglected by citizens and governments, to correctly understand the game rules of their participation in the global division of labor.<sup>5</sup>

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<sup>1</sup> See, e.g., Petersmann (1997).

<sup>2</sup> See, e.g., Petersmann (2014).

<sup>3</sup> See, e.g., Petersmann (2015).

<sup>4</sup> For a detailed introduction to Petersmann's academic profile, see Marise Cremona et al., *Preface, in Reflections on the constitutionalization of international economic law: liber amicorum for ernst-ulrich petersmann* (Marise Cremona et al. eds.), (2014).

<sup>5</sup> Petersmann (2012).

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The authors believe that Petersmann's theory is paradoxical. On the one hand, he posits that the universal recognition of human rights requires "respect for legitimate 'legal pluralism'" and "respect for the legitimate diversity of 'constitutional pluralism.'"<sup>6</sup> On the other hand, he argues for a cosmopolitan conception of IEL by saying, "Non-hierarchical legal relationships between diverse national and international legal sub-systems must be coordinated and clarified on the basis of 'universalizable' principles of justice, human rights, deliberative democracy, transnational rule of law and other common constitutional principles like judicial comity."<sup>7</sup> Therefore, the question that arises is whether there are such 'universalizable' principles and common constitutional principles that can guarantee the compatibility between 'legal pluralism' and a cosmopolitan conception of IEL. Or, to put it another way, is Petersmann's IEL constitutionalization theory coherent in terms of the interrelationship between 'legal pluralism' and the cosmopolitan conception of IEL? This article aims to inquire into this issue.

The logic and rationality of the development of the above thesis must be explained in a few more words. Professor Petersmann has frequently presented the words 'multilevel governance,' 'multilevel judicial protection,' 'multilevel cooperation,' and 'multilevel constitutionalism' to clarify that his theory covers national, regional, and transnational subsystems of IEL. However, his theoretical sources come primarily from Kant, Rawls, and other Western philosophers, and his empirical support is mainly drawn from European culture.<sup>8</sup> Petersmann has given much less consideration to the thought and practice in non-English speaking countries, including China, as a world member that plays an increasingly important role in global economic development. Hence, inquiry is necessary as to whether the Western-style constitutional conception of IEL is representative of a global understanding and whether the constitutionalization experience in Europe exhibits a world-wide tendency. In addition to the multilevel coverage of his theory, a number of keywords are repeatedly used in Prof. Petersmann's writings, including 'human rights,' 'principles of justice,' 'judicial protection of individual rights,' 'interdependent public goods,' 'participatory democracy,' 'rule of law,' 'cosmopolitan rights,' and 'overlapping consensus.' The authors consider the first three, which constitute the skeleton of Petersmann's IEL constitutionalization theory, the most important. By focusing on the clarification of these three keywords in the context of traditional Chinese thought and China's progressive integration into the world economy, this article will also attempt to make a contribution to improving the discourse on IEL constitutionalism.

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<sup>6</sup> Id. at 16.

<sup>7</sup> Id.

<sup>8</sup> According to Prof. Petersmann's own words, IEL constitutional elements "are more developed in European law than in other international legal systems." See id. at 3.

## Human Rights

### A. Human Rights as a Foundation of Petersmann's IEL Constitutionalization Theory

Petersmann regards human rights law as the foundation of the development of IEL in the twenty-first century.<sup>9</sup> Under the premise that human rights were a 'Western invention'<sup>10</sup> and that North America and Europe have different priorities in the protection of human rights,<sup>11</sup> he pays inadequate attention to the interpretation and realization of human rights in China. For the purpose of better clarification and comparison, a recap of Petersmann's articulation in this regard is needed.

Petersmann's understanding of human rights can be epitomized in two words, i.e., individualism and antagonism. Individualism is embedded in his argument for reinterpreting and redesigning IEL by "treating citizens as subjects and 'democratic principals' of international economic regulation of mutually beneficial economic cooperation among citizens."<sup>12</sup> He thinks that the prevailing conception of IEL as "international law among states" to promote national interests cannot be justified in view of its "failures to prevent unnecessary international poverty, banking crises, financial and environmental crises"<sup>13</sup> and that the human rights obligations of all UN member states require an IEL paradigm shift by constitutionalizing IEL to better protect citizen interests. Antagonism is reflected in his repeated comments about "rivalry among individuals, groups and people."<sup>14</sup> Following the Westphalian mode of international economic regulation in which governments and rent-seeking interest groups would often abuse public and private power to the detriment of general consumer welfare, he contends that "human rights and other 'principles of justice' may justify 'struggles for rights' by citizens and parliaments for additional legal, parliamentary and judicial 'checks and balances' of intergovernmental regulation."<sup>15</sup>

Petersmann acknowledges the significance of economic, social, and cultural human rights as well as that of civil and political human rights, which are indivisible in his view. More importantly, in line with the EU tradition but not congruent with human rights specialists in common law states, he attaches greater importance to economic freedoms as fundamental rights.<sup>16</sup> In his earlier work, *Constitutional Functions and Constitutional Problems of International Economic Law*, Petersmann explained the problem of protectionism in domestic foreign trade regulation as a constitutional problem and called for direct application of the GATT rules in domestic courts to

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<sup>9</sup> Petersmann (2012).

<sup>10</sup> Petersmann, *supra* note 5, at 240.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> *Id.* at 74.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 35.

<sup>15</sup> *Id.* at 144.

<sup>16</sup> *Id.* at 173–74.

constitutionalize arbitrary foreign trade policy, thereby protecting individual rights.<sup>17</sup> In view of the fact that market freedoms as fundamental individual rights have gained judicial protection in the EC and played an important role in market integration, he contends that market freedoms “can reinforce and extend the protection of basic human rights.”<sup>18</sup> Based on the position that human rights law and economic integration law offer mutually beneficial synergies, he recommends connecting human rights law with the law and practice of intergovernmental organizations.<sup>19</sup> Relying on Kantian and Rawlsian theories of justice to justify the maximum equal liberties in citizen-driven competition and international trade, he argues for legitimizing many state-centered, power-oriented regimes of international economic governance in light of the citizen-oriented principles of human rights law.<sup>20</sup> The authors hold the opinion that this understanding of economic freedoms, notably trade freedom, is the primary impetus behind his entire theory of IEL constitutionalization.

## B. Human Rights in Chinese Thought

The Chinese characters ‘renquan 人权,’ a generally accepted translation of the English term ‘human rights,’ was never used in the Chinese literature before the late nineteenth century.<sup>21</sup> However, this does not mean that traditional Chinese thought cares less about respect for human dignity. In fact, Chinese philosophy has a particular expression for topics similar to the modern meaning of human rights. Early Confucians provided the basis of Chinese thought on human rights, which can be summarized as regarding the people as the foremost. Confucius said, “If the people have plenty, their prince will not be left to want alone. If the people are in want, their prince cannot enjoy plenty alone.”<sup>22</sup> Mencius noted, “Within a state, the people are the foremost, the state comes second, and the ruler is the least important.”<sup>23</sup> Xunzi also said, “The monarch is a boat, while the people are water; the water bears the water, but it can also swallow it up.”<sup>24</sup> The Confucian thought of regarding the people as the foremost emphasizes that only if the monarch cares for the wellbeing of the people can the monarchy be maintained. However, the key point of this thought

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<sup>17</sup> See Petersmann (1991).

<sup>18</sup> Petersmann (2002).

<sup>19</sup> Id. at 621. Petersmann’s view of economic freedoms as fundamental rights triggered an academic debate on the relationship between trade liberalization and human rights protection in 2002. See P. Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT’L L. 815, 815–44 (2002); R. Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT’L L. 651, 651–59 (2002); E. U. Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 Eur. J. Int’l L. 845, 845–51 (2002).

<sup>20</sup> Petersmann, *supra* note 5, at 139.

<sup>21</sup> Xiangfei (2008).

<sup>22</sup> Confucius, *The Analects*, Book Xii Yen Yuan, Chap. IX. See James Legge, *The Chinese Classics: With a Translation, Critical and Exegetical Notes, Prolegomena, and Copious Indexes (I & II)*, at 255 (2001).

<sup>23</sup> Mencius, *The Works of Mencius*, Tsing Sin Part II, Chap. IV. See Id. At 483.

<sup>24</sup> Xunzi, *Xunzi* (Wang Weiwei Trans. & Annot.), At 63 (2014).

is in the ruler's obligation to the people rather than the positive rights the people may have.<sup>25</sup> Petersmann also properly compares the two boat stories in the works of Xunzi and Plato, saying that the people in the Chinese story are not capable of steering, whereas in the Western story, the people, who are on the same boat with the ruler, own 'constituent power'.<sup>26</sup>

Traditional Chinese thought admits the significance of people's desires for fulfilling lives,<sup>27</sup> which is somewhat akin to Petersmann's emphasis on economic freedoms. Huang Zongxi said, "The people as a whole should benefit," but he did not say to "protect the interests of every individual."<sup>28</sup> Traditional Chinese propriety requires a man to love others with virtues. Therefore, in traditional Chinese thought, people should think of others rather than compete for limited resources. Chinese society is explained as a human community; when people seek to attain what they desire, they have a duty to ensure that others get what they want.<sup>29</sup> Even when the 1890 reformers talked about *minquan* 民权 (people's authority) drawing on the Western concept of 'rights,' they thought of the authority of the people as a group rather than that which can be shared by every individual.<sup>30</sup>

Contemporary Chinese scholars think that cultural traditions have a significant influence on the conception of human rights. As opposed to the individual-centered culture in the West, traditional Chinese culture stresses the indivisibility of individuals, families, and the state, which has fostered a Chinese conception of human rights that prioritizes the rights to subsistence and development and underpins collective rights.<sup>31</sup> All in all, Chinese thought on human rights emphasizes the wellbeing of the people and their utmost significance to the state, but it does not encourage individuals' competition with others and state power. In this sense, Chinese thought on human rights stands in sharp contrast with the individualism and antagonism reflected in Petersmann's human rights understanding.

### C. Evolution of Free Trade Right in China as an Illustration of Human Rights Development in China

The Chinese Constitution amended in 2004 declares for the first time that "the state respects and protect human rights."<sup>32</sup> Before then, however, some 'fundamental rights' have been confirmed in it, including voting right,<sup>33</sup> freedom of speech,<sup>34</sup>

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<sup>25</sup> S. C. Angle, *Human Rights and Chinese Thought: A Cross-Cultural Inquiry* (Cambridge; New York: Cambridge University Press, 2002), at 125.

<sup>26</sup> Petersmann (2016).

<sup>27</sup> ANGLE, *supra* note 25, at 93–98.

<sup>28</sup> Id. at 126.

<sup>29</sup> Id. at 96–97.

<sup>30</sup> Id. at 126.

<sup>31</sup> Xianming (1999).

<sup>32</sup> The Standing Committee of the National People's Congress of the PRC (SCNPC), *Zhonghua Renmin Gongheguo Xianfa* [The Constitution of the PRC] 2004, art. 33.

<sup>33</sup> Id. art. 34.

<sup>34</sup> Id. art. 35.

personal dignity,<sup>35</sup> and labor right.<sup>36</sup> In the same year, the amended Foreign Trade Law of China also confirms Chinese citizens' foreign trade freedom, though it still has not been recognized as a 'fundamental right' in the Chinese Constitution. Considering that economic freedoms, notably trade freedom, are emphasized in Petersmann's theory, we concentrate on the evolution of Chinese citizens' free trade right in the context of China's progressive liberalization of foreign trade governance, which can be divided into four phases as follows.

### **1949–1978: State Monopoly**

In the beginning, the Chinese Communist Party ('CCP') adopted an economic policy featuring all-around central planning and control as a countermeasure to an economic blockade and embargo imposed by the West. Consequently, a foreign trade policy emphasizing control by the central government came into being. Private foreign trade organizations were gradually eliminated, so all foreign trade transactions were ultimately handled by state corporations under the direct control and supervision of the government pursuant to a master plan. During this period, individuals and private corporations were completely deprived of foreign trade rights.<sup>37</sup>

### **1978–1992: Tentative Reform**

After the Cultural Revolution (1966–76), China entered into a new era accentuating reform and development. As the economy was dragged carefully away from the former stringent planning system, foreign trade policy became less rigid as well. To promote foreign trade growth, a series of tentative reform measures were carried out, including the devolvement of foreign trade operational rights to local branches and the diversification of trade business organs. However, foreign trade was then a privilege of state-owned corporations, which were essentially an arm of the government. Individuals and private corporations were not yet allowed to engage in this industry.<sup>38</sup>

### **1992–2001: Preliminary Liberalization**

During this period, a socialist market economy was confirmed by the CCP as the development goal of China,<sup>39</sup> and the political leaders strongly supported China's

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<sup>35</sup> Id. art. 38.

<sup>36</sup> Id. art. 42.

<sup>37</sup> The Common Programme (interim Constitution) of the PRC proclaimed on 1 October 1949 make clear that the state implements foreign trade control and adopts protectionist trade policy. See also Ma Fengqin, *Zhongguo Duiwai Maoyi i Maoyi i Zhengce Yu Guanli* [China's Foreign Trade Policies and Management], at 11–12 (1995).

<sup>38</sup> Shen Muzhu, *Zhongguo Duiwai Maoyi Falv* [China's Foreign Trade Law], at 8–10 (1989). See also Sally Lord Ellis, *Decentralization of China's Foreign Trade Structures*, 11 *Georgia J. Int'l & Comp. L.* 283, 284 (1981).

<sup>39</sup> See *Zhonggong Zhongyang guanyu Wanshan Shehuizhuyi Shichang Jingji Tizhi iRuogan Wenti de Jueding* [The Decision of the CCP Central Committee on Relevant Issues concerning Improving the Socialist Market Economy System] (October 2003), [http://www.gov.cn/test/2008-08/13/content\\_1071062.htm](http://www.gov.cn/test/2008-08/13/content_1071062.htm).

accession to the GATT-WTO system. To satisfy the accession requirement, preliminary efforts were made to bring its legal system into consistency with the GATT-WTO rules. As a result, the first Foreign Trade Law went into force as of 1 July 1994. This law purported to maintain a fair and liberalized foreign trade order and to safeguard the business autonomy of foreign trade dealers.<sup>40</sup> However, this law also set forth the basic requirements for a foreign trade dealer. In particular, it required permission from the competent authorities.<sup>41</sup> Therefore, foreign trade right was subjected to government license, which, in fact, excluded individuals and most private corporations from this industry.

### **2001::Complete Conferral of Foreign Trade Right**

After fifteen years of prolonged negotiations, China became the 143rd member of the WTO on December 11, 2001. Additionally, the Foreign Trade Law was amended in April 2004. This amendment clearly stated the protection of the legitimate rights and interests of foreign trade dealers<sup>42</sup> and recognized individuals as subjects of foreign trade dealers.<sup>43</sup> Furthermore, in line with the requirement of China's Protocol of Accession, the amendment changed the previous licensing requirement to the current registration requirement for obtaining foreign trade rights.<sup>44</sup> In this sense, free trade right has been completely conferred to Chinese citizens from that time.

From the above overview of the evolution of foreign trade rights in China, the CCP policymakers significantly pushed forward this historical process according to the international and domestic environment. Although those reform policies, notably the conferral of foreign trade freedom, have sometimes been reflected in laws, the legislator approving those laws is essentially an extended branch of the CCP bureaucracy,<sup>45</sup> meaning the laws are hardly an outcome of participatory democracy. To put it another way, this is not a process of 'struggles for rights' as advocated by Petersmann.<sup>46</sup> Even without such 'struggles for rights,' however, the Chinese people are largely better off, along with China's progressive integration into the world. The Chinese people were not unhappy, even with the government's overall decision-making in a less democratic mode during the past four decades. In contrast, by purporting to "represent...the fundamental interests of the overwhelming majority

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<sup>40</sup> SCNPC, *Zhonghua Renmin Gongheguo Duiwai Maoyi Fa* [Foreign Trade Law of the PRC] 1994, art. 4.

<sup>41</sup> *Id.* art. 9.

<sup>42</sup> SCNPC, *Zhonghua Renmin Gongheguo Duiwai Maoyi Fa* [Foreign Trade Law of the PRC] 2004, art. 1.

<sup>43</sup> *Id.* art. 8.

<sup>44</sup> *Id.* art. 9.

<sup>45</sup> For example, among the 175 members of the 10th CNPC, which is also the legislator of the 2004 Amendment of the Foreign Trade Law, 118 were from the CCP, making the CCP the predominant component. See Zhang Tao, *Dishijie Quanguo Renda Changweihui Zuchengrenyuan Jiegou Fenxi: Zhuyao Tedianyu Jiegou Fenxi* [An Analysis of the Constituent Structure of the 10th SCNPC: Main Characteristics and Development Tendency], 7 *Dangdai Zhongguo Zhengzhi Yanjiu Baogao* [Contemporary Chinese Politics Review] 78, 80(2009).

<sup>46</sup> E. U. Petersmann, *supra* note 5, at 144.



of the Chinese people,<sup>47</sup> the CCP obtained external legitimacy for its ruling. As the Three-Step Development Strategy has illustrated,<sup>48</sup> the people's lives are always the primary concern, which is bound up with state development. In short, the evolution of foreign trade freedom in China is a modern embodiment of traditional Chinese thought on human rights, which is characterized by regarding the people as the foremost, while abating individualism and antagonism.

## Principles of Justice

### A. Petersmann's Theory of Justice for IEL

Petersmann's elaboration on justice for IEL is a mixture of Kantian and Rawlsian theories on justice and human rights law, as illustrated in the three principles of justice he suggested.<sup>49</sup> Inspired by Kant's extension of the constitutional conception of law to international law,<sup>50</sup> Petersmann asserts that "maximum equal freedoms as a first principle of justice ..... has become a matter of positive national and international law"<sup>51</sup> In particular, he implies that worldwide 'market freedoms' may be defined as cosmopolitan expansions of Rawls' first principle of justice.<sup>52</sup> In contrast to Rawls' refusal to extend his 'difference principle' from liberal nations to the international level, Petersmann opines that deepening globalization and modern human rights law may provide convincing reasons for a cosmopolitan 'second principle of justice.'<sup>53</sup> Borrowing Kant's phrase the 'moral imperative,' Petersmann recommends "multi-level constitutional protection of a just cosmopolitan order" as the third principle of justice, given that citizens agree on the constitutional principles of justice.<sup>54</sup> In toto,

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<sup>47</sup> See NPC, *Zhonghua Renmin Gongheguo Xianfa* [Constitution of the PRC] 2004, Preamble.

<sup>48</sup> The Three-Step Development Strategy is China's overall economic development objective from 1980s to the middle of the twenty-first century: step one is to double the 1980 GNP and ensure that the people have enough food and clothing; step two is to quadruple the 1980 GNP by the end of the twentieth century and ensure the Chinese people a well-off life; step three is to increase per-capita GNP to the level of the medium-developed countries by the mid-twenty-first century and to ensure the Chinese people a wealthy life. See ZHAO Ziyang, *Yanzhe You Zhongguo Tese de Shehuizhuyi Daolu Qianjin: Zai Zhongguo Gongchan Dang Dishisanci Quanguo Daibiao Dahuishang de Baogao* [Walk on the Road to Socialism with Chinese Characteristics: Report Delivered at the 13th National Congress of the CCP] (1987), <http://cpc.people.com.cn/GB/64162/64168/64566/65447/4526368.html>.

<sup>49</sup> See PETERSMANN, *supra* note 5, at 355–371.

<sup>50</sup> See Petersmann, *supra* note 5, at 164.

<sup>51</sup> Petersmann (2003).

<sup>52</sup> Petersmann, *supra* note 9, at 307.

<sup>53</sup> Petersmann, *supra* note 5, at 361.

<sup>54</sup> However, the inevitable nature of certain normative disagreements is the major concern in Rawls' later work. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 798–805 (1997).

economic freedoms, equality, and human rights are the three major components of Petersmann's theory of justice for IEL.

It seems that Petersmann has not provided fully convincing reasoning on how to institutionalize the 'cosmopolitan public reason' in multilevel economic governance by endorsing the three principles of justice; in other words, there might be an internal tension in his arguments for 'economic freedoms' and for 'a just cosmopolitan order.' In line with the Kantian acknowledgement of man's selfish tendencies purportedly contributing to a law-governed social order,<sup>55</sup> Petersmann stresses the importance of citizens' transnational market competition free of abuses of public and private power. However, in a transnational market where wide-ranging disagreements among billions of people should be respected when they compete for their own interests, how can the 'overlapping consensus' on a constitutionally justified 'cosmopolitan order' be attained? Brexit shows that there are certain people who are antagonistic to the idea of a single European market. With the new Trump administration, which has successfully echoed the voices of low-income people (rather than some protectionist groups) to suspend trade liberalization, the US is likely to take a more conservative view on economic globalization. Although Petersmann mentioned the 'Arab spring' to demonstrate poor people's 'struggle for justice' for the purpose of establishing a justified national and international legal system, its consequence was multiple wars, political instability, and economic decline in the Arab region, with little freedom seen. All these landscapes would imply that it is difficult to arrive at an 'overlapping consensus' on the constitutionalization of IEL from Petersmann's advocating of economic freedoms.

## B. Social Justice in Chinese Thought

Petersmann is congruent with Rawls insofar as they favor 'reasonable rules and institutions' over natural resources.<sup>56</sup> According to traditional Chinese thought, however, all institutional arrangements are subject to the feelings and assessment of mankind, and social justice and its realization are no exception. That is, regardless of whether social justice is to be realized by putting the Rawlsian, utilitarian, or any other theory of justice into practice, a good development of the moral sense of mankind is the most important thing. According to this idea, no matter how reasonable and justified a social institutional arrangement is, a man without a righteous heart can always maximize his own interests by craftily seizing advantages. In contrast, even in an authoritarian society, a controller of the public power with good moral sense can do justice to the society by carrying out social governance that can promote social development while benefitting the least advantaged. Consequently, traditional Chinese thought is more concerned with the issue of men's hearts than institutional problems; it believes that justice emanates from an innate disposition rather than from external rules. Only when the people have self-conscience in social justice

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<sup>55</sup> I. Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in Kant, *Political Writings* (Hans Reiss ed.) (1970).

<sup>56</sup> Petersmann, *supra* note 5, at 156.

can the rules and institutions play a concrete role in maintaining social justice more effectively. A Confucian classic states,

The ancients, who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own States. Wishing to order well their States, they first regulated their families. Wishing to regulate their families, they first cultivate their persons. Wishing to cultivate their persons, they first rectified their hearts. Wishing to rectify their hearts, they first sought to be sincere in their thoughts . . . . . From the Son of Heaven down to the mass of the people, all must consider the cultivation of the person the root of everything besides.<sup>57</sup>

Confucian philosophers believed in oneness between the natural world and the human world. Xunzi said, “The nature has its own intrinsic rules, which is not subject to meritocracy or tyranny of a monarch.”<sup>58</sup> Therefore, people were taught to regard themselves as an integral part of nature and to accord themselves with nature by acting in conformity with the rules of nature. Confucian thought regards harmony as fundamental in interpersonal relationships<sup>59</sup>; in terms of the interactions between people and the state, a collective sense of promoting stability and solidarity is emphasized. Nevertheless, harmony does not mean the denial of diversity and difference. As reflected in the saying that “harmony gives birth to all things while being the same leads to no development,”<sup>60</sup> harmony is based on pluralistic coexistence, whereas justice is not tantamount to egalitarianism. As a reflection of this harmonious worldview and the emphasis on self-cultivation, Chinese thought has constantly emphasized keeping *yi* 義 in mind when looking for benefits.<sup>61</sup> Confucius said, “Riches and honours acquired by unrighteousness, are to me as a floating cloud.”<sup>62</sup> Hence, if there is a clash between *yi* and 利 benefits, it is suggested to practice *yi* and to ignore benefits.

### C. Social Justice Practiced in China

The whole process of China’s opening-up and progressive integration into the world economic system is also a way to realize social justice. In the late 1970s, China began to open its doors to the outside world by putting forward preferential policies to draw in foreign investment.<sup>63</sup> Its subsequent arduous efforts in entering into the WTO system revealed a strong will to “develop equal and mutually beneficial

<sup>57</sup> The Great Learning in The Book of Rites. See LEGGE, *supra* note 22, at 357–59.

<sup>58</sup> Xunzi, *supra* note 24, at 166.

<sup>59</sup> Confucius, The Analects, Book I Hsio R, Chap. XII (saying that application of the rites is for harmony. See LEGGE, *supra* note 22, at 143.

<sup>60</sup> ZuoQiuming, Guoyu [Discourses Of The States] (Zhang Yongxiang trans. &annot.), at 322 (2015).

<sup>61</sup> Yi is a Confucian virtue roughly equivalent to righteousness or justice in English.

<sup>62</sup> Confucius, The Analects, Book VII Shu R, Chap. XV. See LEGGE, *supra* note 22, at 200.

<sup>63</sup> The preferential policies have been reflected in several Chinese laws, including Zhonghua Renmin Gongheguo Zhongwa iHeziJingying Qiye Fa [Law of the PRC on Chinese-Foreign Equity Joint Ventures], Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa [Law of the PRC on Chinese-Foreign Contractual Joint Ventures], and Zhonghua Renmin Gongheguo Waizi Qiye Fa [Law of the PRC on Wholly Foreign-owned Enterprises]. The former two were adopted in July 1979, and the third was adopted in April 1986.

economic cooperation with various countries.”<sup>64</sup> The results following these efforts are splendid: China has risen onto the world stage; hundreds of millions of Chinese people come out of impoverishment; and China has made a positive contribution to world development.<sup>65</sup> This process strongly proves the correctness of China’s belief in the oneness and harmonious nature of the world.

Some might think, as expressed by Petersmann,<sup>66</sup> that it is the WTO system that plays a major role in helping China alleviate poverty. However, insofar as the social justice it has brought about is concerned, this process complies with an indigenous Chinese tradition rather than a Western-fashioned liberal way. In the early stage of modern China’s economic reform, China faced a large population, a weak economic foundation, and unbalanced development. China has since strived to find its own way to development by “feeling the stones before crossing the river”<sup>67</sup> instead of completely adopting some kind of “reasonable rules and institutions.” This way is an exact exemplification of the traditional Chinese holism concept in terms of its consistent stress on collective flourishing, namely not merely the prosperity of the state but also the richness of the people.<sup>68</sup>

Following China’s accession into the WTO, the 2004 Chinese Constitution clarified that the state protects the lawful rights and interests of the individual<sup>69</sup> and that the lawful private property of citizens may not be encroached upon.<sup>70</sup> In this regard, the Chinese socialist market economy has not been developed by predominantly relying on citizens’ struggles for economic freedom.<sup>71</sup> Instead, it has always been directed by a master plan, as illustrated by the periodically updated Five-year Guidelines for Development.<sup>72</sup> Undoubtedly, this is not a way to realize social justice as

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<sup>64</sup> See Zhongguo Gongchan Dang Dishiyijie Zhongyang Weiyuanhui Disanci Quanti Huiyi Gongbao [Gazette of the 3rd Plenary Session of the 11th Central Committee of the CCP] (2009), [http://www.gov.cn/test/2009-10/13/content\\_1437683.htm](http://www.gov.cn/test/2009-10/13/content_1437683.htm).

<sup>65</sup> It is estimated that China will still contribute to global economic growth in future years. See OECD, *Looking to 2060: A Global Vision of Long-Term Growth*’ OECD Economics Department Policy Notes, No 15, (November 2012), <https://www.oecd.org/eco/outlook/2060policynote.pdf>.

<sup>66</sup> Petersmann (2011).

<sup>67</sup> See Chen Yun, Chen Yun Wen Xuan [Selected Essays of Chen Yun], Vol. 3, at 279 (1986) (stating that reforms must be carried out on the basis of careful initiative and the instant summarization of experience).

<sup>68</sup> See Xijiping, Zai Dishierjie Quanguo Renmin Daibiao Dahui Diyi Huiyishang de Jianghua [Speech on the First Session of the 12th National People’s Congress] (March 17, 2013), [http://news.xinhuanet.com/2013/03/17/c\\_115055434.htm](http://news.xinhuanet.com/2013/03/17/c_115055434.htm).

<sup>69</sup> SCNPC, *Zhonghua Renmin Gongheguo Xianfa* [The Constitution of the PRC] 2004, art. 11.

<sup>70</sup> *Id.* art. 13.

<sup>71</sup> The distinctiveness of the Chinese market economy can be indirectly perceived by the continuing denial of a market economy status by the EU and the US even after a 15-year period expired after China’s accession to the WTO. See Request for Consultations by China, *United States—Measures Related to Price Comparison Methodologies*, WT/DS515/1 (December 12, 2016); Request for Consultations by China, *European Union—Measures Related to Price Comparison Methodologies*, WT/DS516/1 (December 12, 2016).

<sup>72</sup> Five-year Guidelines (Plans) are formulated by the CCP through the plenary sessions of the Central Committee and passed by national congresses. The ongoing 13th Five-year Guideline runs from 2016 to 2020 and includes such goals as fostering green industry, bridge the

perceived by Rawls or Petersmann, especially given that China allowed some people to get rich ‘first’.<sup>73</sup> However, due to China’s well-designed development plan, 1.1 billion people have gone out of poverty,<sup>74</sup> which would be seen as a great achievement for global justice.<sup>75</sup> In addition, as China attaches more importance to ‘rule of virtue’<sup>76</sup> and pays more attention to the problem of wealth inequality, traditional Chinese thought on *yi* will play a more important role in achieving social justice.

At the global level, the “Belt and Road” Initiative is a China-promoted public good for regional cooperation and development. It has been inspired by the ancient Chinese Silk Road spirit: “peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit.”<sup>77</sup> As discerned from its commitment to cooperation, harmony, inclusiveness, and mutual benefit,<sup>78</sup> the “Belt and Road” Initiative is another exemplification of the traditional Chinese view of a harmoniously co-progressing world. With regard to the implementation of this strategy, cooperation priority is given to facilities’ connectivity, i.e., to “jointly push forward the construction of international trunk passageways, and form an infrastructure network connecting all sub-regions in Asia, and between Asia, Europe and Africa step by step.”<sup>79</sup> China will share with other countries its experience in infrastructure construction and related investment as an engine for economic development. In this sense, the “Belt and Road” Initiative is much like an extension of Chinese ‘virtues’ based on China’s ‘self-cultivation.’ This is an exact illustration of Confucius’ saying, “The man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to be enlarged himself, he seeks also to enlarge others.”<sup>80</sup>

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existing welfare gaps, and deep participation in global economic governance. See Zhonghua Renmin Gongheguo Dishisange Guomin Jingji he Shehui Fazhan Dishisange Wunian Guihua Gangyao [The 13th Five-year Guidelines for Economic and Social Development of the PRC], [http://news.xinhuanet.com/politics/2016lh/2016-03/17/c\\_1118366322.htm](http://news.xinhuanet.com/politics/2016lh/2016-03/17/c_1118366322.htm).

<sup>73</sup> See Deng Xiaoping, Deng Xiaoping Wen Xuan [Selected Essays Of Deng Xiaoping], VOL. 3, at 155 (2001) (stating that subject to the principle of common prosperity, a part of the people and regions are allowed to get rich first to prompt other people and other regions to get rich).

<sup>74</sup> Xinhua, President Xi Jinping’s UN speech in 6 key words (September 28, 2015), [http://www.xinhuanet.com/english/china/2015-09/29/c\\_134672436.htm](http://www.xinhuanet.com/english/china/2015-09/29/c_134672436.htm).

<sup>75</sup> For poverty and inequality as a major issue in global justice, see Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 Mich. J. Int’l L. 975, 975–1049 (2000).

<sup>76</sup> See Xinhua, *Xi Stresses Integrating Law, Virtue in State Governance* (December 10, 2016), [http://news.xinhuanet.com/english/2016-12/10/c\\_135895641.htm](http://news.xinhuanet.com/english/2016-12/10/c_135895641.htm).

<sup>77</sup> See National Development and Reform Commission of the PRC, Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Mar. 28, 2015), [http://en.ndrc.gov.cn/newsrelease/201503/t20150330\\_669367.html](http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html).

<sup>78</sup> See id.

<sup>79</sup> See id.

<sup>80</sup> Confucius, *The Analects*, Book Vi Yung Yey, Chap. Xviii. See Legge, *supra* note 22, at 194.

## Judicial Protection of Individual Rights

### A. Multilevel Judicial Protection of Individual Rights in IEL as Designed by Prof. Petersmann

Judicial protection of individual rights is another facet of Petersmann's IEL constitutionalization theory. Within a nation state, the legislature, the executive, and the judiciary are all important branches for safeguarding constitutionalization in light of the original meaning of the word 'constitution.' Within the global community, however, there is not yet a world government. How will citizens' constitutional rights be protected at the global level? To resolve this issue, Petersmann attaches significance to courts of justice, which he considers "the most independent guardians of the constitutional rights of citizens."<sup>81</sup>

Drawing on the experience of European courts in interpreting IEL for individual interests, Petersmann calls for extending this methodology to other parts of the world.<sup>82</sup> Although it is difficult to understand Petersmann's articulation of this point, the authors would address rough clues in his writings as follows. First, the universal recognition of human rights provides constitutional justification for the connection and coordination between national and international legal systems and judicial procedures for peaceful dispute settlement on the basis of judicial clarification of 'principles of justice.'<sup>83</sup> Second, constitutional nationalism must be complemented by multilevel constitutionalism by empowering individuals adversely affected by international economic regulation with 'access to justice' in national and international judicial procedures.<sup>84</sup> Third, judicial interpretation of IEL in compliance with human rights law has the potential to enhance legal coherence in worldwide governance institutions and to decrease legal fragmentation among national and transnational legal regimes.<sup>85</sup>

### B. A Comparison from the Perspective of Chinese Judicial Thought and Practice

Historically, China has no tradition of separation of powers between the executive and the judiciary, mainly because there was little inherent calling for such separation due to the country's stress on social harmony. Additionally, a precondition for Petersmann's vision of multilevel judicial protection of individual rights in IEL is the independence of courts of justice and arbitral tribunals at the national and international levels. Without a strong force calling for judicial independence in the current anarchic world, it is difficult to assure adjudication of cases in strict compliance with the so-called 'principles of justice,' including respect for human rights.

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<sup>81</sup> Petersmann, *supra* note 9, at 291.

<sup>82</sup> Petersmann, *supra* note 5, at 456.

<sup>83</sup> Petersmann, *supra* note 5, at 438–39.

<sup>84</sup> Petersmann, *supra* note 5, at 445.

<sup>85</sup> Petersmann, *supra* note 9, at 313.

“Rule of virtues” is an important teaching of Confucianism. By advocating “government exercises by means of virtue,”<sup>86</sup> Confucius attached greater importance to moral sense than man-made rules in adjusting the relationship between people, with a view toward “causing the people to have no litigations.”<sup>87</sup> This approach fits with the Confucian thought of regarding the people as the foremost, in terms of its respect for the people as a whole and its reliance on human nature. The prioritized pursuance of harmony in Confucian thought entails a prevalent anti-litigation mindset among Chinese people. In the Protocol on China’s WTO accession, China provides a guarantee for all specific administrative cases to be reviewed by an impartial and independent judicial body.<sup>88</sup> In conformity with this undertaking, the Supreme People’s Court makes clear that the adjudication of administrative cases relating to antidumping and countervailing investigations shall be handled by at least an intermediate court.<sup>89</sup> Subsequent to the promulgation of these judicial interpretations, however, no relevant cases have yet been brought to these courts, indicating a persistent anti-litigation mindset regarding China’s foreign trade regulation today.<sup>90</sup> In contrast, mediation, as an alternative dispute-settlement mechanism focusing on conciliation based on the disputants’ own will, plays an important role in Chinese judicial practice. Compared to litigation, mediation has its advantages in saving cost and time. Due to the voluntary acceptance by the disputants, furthermore, the mediation result can be easily implemented without any negative effect on later cooperation between the disputants.<sup>91</sup>

Until now, a target of “comprehensively advancing rule of law” has been confirmed in China. Because of a “socialist rule of law with Chinese characteristics,”<sup>92</sup> there must be some aspects of traditional ideas in the Chinese judiciary that fundamentally differentiate China’s practices from those of Western countries. On one hand, the mission of “comprehensively advancing the rule of law” falls under the leadership of the CCF,<sup>93</sup> which implies that rule of law is still an instrument to fulfill the overall goal

<sup>86</sup> Confucius, *The Analects*, Book II Wei Chang, Chap. I. See LEGGE *supra* note 22, at 145.

<sup>87</sup> Confucius, *The Analects*, Book XII Yen Yuan, Chap. XIII. See LEGGE *supra* note 22, at 257.

<sup>88</sup> Protocol on the Accession of the PRC, 23 November 2001, WT/L/432, art. 2(D)(1).

<sup>89</sup> Zuigao Renmin Fayuanguan Yu Shenli Fanqingxiao Xingzheng Anjian Yingyong Falv Ruogan Wenti de Guiding [The Supreme People’s Court’s Interpretation Concerning Several Questions about Adjudication of Administrative Cases Relating to Antidumping Investigation] 2003, art. 5; Zuigao Renmin Fayuanguan Yu Shenli Fanbutie Xingzheng Anjian Yingyong Falv Ruogan Wenti de Guiding [The Supreme People’s Court’s Interpretation Concerning Several Questions about Adjudication of Administrative Cases Relating to Countervailing Investigation] 2003, art. 5.

<sup>90</sup> This conclusion is based on case searching in major online case databases in China, including China Judgment on Line ([www.wenshu.court.gov.cn](http://www.wenshu.court.gov.cn)), PKULAW ([www.pkulaw.cn](http://www.pkulaw.cn)), Jufa Cases ([www.jufaanli.com](http://www.jufaanli.com)), and [www.wenshu.court.gov.cn](http://www.wenshu.court.gov.cn).

<sup>91</sup> For a detailed analysis of China’s mediation system, see Wang Liming, *Characteristics of China’s Judicial Mediation System*, 17 ASIA PAC. L. REV. 67, 67–74 (2009).

<sup>92</sup> See Zhonggong Zhongyang guanyu QuanmianTuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding [The Decision of the CCP Central Committee Concerning Important Issues on Comprehensively Advancing the Rule of Law (October 23, 2014), [http://news.xinhuanet.com/politics/2014-10/28/c\\_1113015330.htm](http://news.xinhuanet.com/politics/2014-10/28/c_1113015330.htm)].

<sup>93</sup> See *id.*

of economic and social development in China. On the other hand, diverse forms of dispute settlement mechanisms, including consultation and mediation, have always been promoted in the Chinese judicial system, with a view toward boosting social justice and maintaining social harmony.<sup>94</sup> Interpretation of the law in specific cases is generally subject to uniform interpretation by the Supreme People's Court,<sup>95</sup> which is unlike the human rights-oriented method advocated by Petersmann. In addition to the pursuit of justice in individual cases, the Chinese judiciary has a broader concern for social harmony and national development, exemplifying traditional Chinese holism thought.

## Value Divergence: Evaluation of Petersmann's Theory from a Chinese Perspective

The above sections demonstrate that there is both similarity and disparity between Petersmann's theory and Chinese thought insofar as the conceptions of human rights, justice, and judicial review are concerned. The similarity can be found in their common emphasis on respect for all human beings. Petersmann prioritizes human dignity in his words, whereas Chinese thought regards the people as the foremost concern. The disparity is perceptible in their distinctive methodologies for attaining the respect for all human beings: the former features bottom-up individual struggles, whereas the latter is characterized by top-down overall consideration. The implications of 'human rights', 'justice,' and 'judicial review' as related concepts are intimately shaped by the philosophical ideas, culture, and even natural conditions in a specific society. Traditional Chinese dialectics considers that all things are composed of two poles, namely Yin 陰 (darkness) and Yang 陽 (light), which stresses heavily the complementarity between the two poles.<sup>96</sup> Western dialectics, as expounded by Hegel, also refers to the principle of polarity, but means the coexistence of opposites.<sup>97</sup> The divergent values exemplified in the different dialectics engender the friction between Petersmann's theory and Chinese thought.

Since "all the sciences are related, more or less, to human nature",<sup>98</sup> the friction between Petersmann's theory and Chinese thought can be explained from the perspective of their different views of human nature. Petersmann's elaboration on

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<sup>94</sup> See Guanyu Renmin Fayuan Jinyibu Shenhua Duoyuanhua Jiufen Jiejue Ji hi Gaige de Yijian [The Opinions on Further Promotion of Plural Dispute Settlement Mechanisms in People's Courts] (June 2016), <http://www.court.gov.cn/fabu-xiangqing-22742.html>.

<sup>95</sup> SCNPC, Zhonghua Renmin GongheguoLifa Fa [The Legislation Law of the PRC] 2015, art. 104 (prescribing that the interpretations on specific application of law in trial work as developed by the Supreme People's Court shall conform to the objectives, principles, and original meaning of legislation).

<sup>96</sup> Monroe (1927).

<sup>97</sup> Bodenheimer (1990).

<sup>98</sup> Hume (2007).



his theory proceeds from the “‘animal spirits’ and rational egoism of individuals,”<sup>99</sup> which somehow resonates with the evil human nature presumed by many Western philosophers. They would thus call for limiting the power of the government as ‘a necessary evil’ by constitutional arrangement to more effectively protect the equal human rights of citizens. Hume stated that “every man ought to be supposed a knave and to have no other end, in all his actions, than private interest.”<sup>100</sup> Madison, the founding father of the US Constitution, also stated, “If men were angels, no government would be necessary.”<sup>101</sup> In contrast, mainstream traditional Chinese thought is based on the goodness of human nature. Mencius observed that all men are created good, just as water flows downstream forever.<sup>102</sup> San Zi Jing, a traditional Chinese classic summarizing Confucianism, starts by saying that “man’s nature at birth is good.”

Both Chinese and Western views of human nature have their pros and cons. By focusing on moral self-cultivation and self-restraint instead of rigid legal rules, controllers of power can improve themselves as role models for the entire society so that abuses of power may be forestalled. Confucius asserted, “When a prince’s personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed.”<sup>103</sup> However, due to the mutability and unreliability of human nature, evilness cannot be absolutely prevented merely by moral self-cultivation and self-restraint. In contrast, Western constitutional theory, based on the evilness of human nature, underlines a mechanism of rights protection by power limitation. It is significant in terms of its emphasis on a principle of ‘checks and balances’ for the prevention of the abuse of power. If the laws for limiting private and government powers are extremely rigid, however, some beneficial attempts and endeavors will be smothered.<sup>104</sup> Further, the presumption that a power controller is unreliable due to the evilness of political power is likely to cause moral degradation of the power controller without moral restriction himself. A historical lesson should not be neglected: the Weimar Constitution was once considered the most representational constitution among democratic nations, but from this constitutional system emerged the Nazi government, which brought enormous disasters to the world. In short, the opposing presumptions of human nature between Petersmann’s theory and Chinese thought lead to an irresolvable theoretical discord.

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<sup>99</sup> Petersmann, *supra* note 5, at 6.

<sup>100</sup> Hume (1882).

<sup>101</sup> Hamilton (1898).

<sup>102</sup> Mencius, *The Works Of Mencius*, Book VI. Kao Tsze. See LEGGE, *supra* note 22, at 395–96.

<sup>103</sup> Confucius, *The Analects*, Book XIII Tsze-lu, Chap. VI. See LEGGE, *supra* note 22, at 266.

<sup>104</sup> Bodenheimer (1999).